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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**
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15 ZITAN TECHNOLOGIES, LLC, a Nevada
16 limited liability company; and GINKGO LLC,
a Nevada limited liability company,

CASE NO.: 3:18-cv-00395-RCJ-WGC

17 **GRANTING**
18 **PRELIMINARY INJUNCTION**

19 LIANG YU, an individual,

20 Defendant.

21 This matter came for hearing on November 13, 2018, on Plaintiffs Zitan Technologies,
22 LLC and Ginkgo LLC/s (collectively, “Plaintiffs” or the “Companies”) Motion for Preliminary
23 Injunction (ECF No. 15). Defendant Liang Yu (“Mr. Yu” or “Defendant”) filed an Opposition to
24 Plaintiffs’ Motion for Preliminary Injunction (ECF No. 26). Plaintiffs filed a reply brief (ECF
25 No. 31). In addition, Plaintiffs filed certain documents appended to Plaintiffs’ unopposed *Ex*
26 *Parte* Motion For Leave to File Documents In Support of Plaintiffs’ Motion for Temporary
27 Restraining Order and Preliminary Injunction Under Seal (ECF No. 7), which the Court
28 permitted (ECF No. 35). The Court previously addressed Plaintiffs’ Motion for Temporary

1 Restraining Order (ECF No. 14), which it denied for the reasons set forth in the Order entered on
2 October 17, 2018. (ECF No. 35).

3 Subsequently, the Magistrate Judge entered an Order staying discovery in this action
4 pending resolution of an arbitration proceeding between Plaintiffs and Defendant (the “Stay
5 Order”) (ECF No. 43).

6 The Court heard oral argument from counsel for both parties and issued a Minute Order
7 granting preliminary injunctive relief on November 13, 2018. (ECF No. 48). The Court did not
8 hear evidence. This Order follows.

9 **I. FACTS**

10 The facts of this matter are set forth in the Court’s prior Order of October 17, 2018 (ECF
11 No. 35) and incorporated herein by reference.

12 **II. LEGAL STANDARDS**

13 **A. Preliminary Injunction**

14 Injunctions are extraordinary remedies, never awarded as of right, but based on a balance
15 of competing claims of injury and the effect on each party of awarding or denying the requested
16 injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

17 To obtain preliminary injunctive relief, the Ninth Circuit has established two alternative
18 sets of criteria:

19 Under the traditional test, a plaintiff must show: (1) a strong likelihood of success
20 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary
21 relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)
22 advancement of the public interest (in certain cases). The alternative test requires
that a plaintiff demonstrate either a combination of probable success on the merits
and the possibility of irreparable injury or that serious questions are raised and the
balance of hardships tips sharply in his favor.

23 *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). The Supreme Court later ruled, however,
24 that a plaintiff seeking a preliminary injunction must demonstrate that irreparable harm is
25 “likely,” not just possible. *Winter v. NRDC*, 555 U.S. 7, 19–23 (2008) (rejecting the alternative
26 “sliding scale” test, at least as to the irreparable harm requirement). In *Stormans, Inc. v. Selecky*,
27 the Ninth Circuit recognized that the “possibility of irreparable injury” test was “definitively
28 refuted” in *Winter* and that the appropriate standard “requires a party to demonstrate ‘that he is

1 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
2 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
3 public interest.”” 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20) (reversing
4 a district court’s use of the Court of Appeals’ pre-*Winter*, “sliding-scale” standard and remanding
5 for application of the proper standard).

6 However, the Ninth Circuit later held in *Alliance for the Wild Rockies v. Cottrell* that
7 although irreparable harm must be more likely than not, the sliding scale approach remains
8 viable as to the other requirements, and a plaintiff needn’t be more likely than not to succeed on
9 the merits, so long as there are “serious questions” on the merits. 632 F.3d 1127, 1134–35 (9th
10 Cir. 2011) (“That is, ‘serious questions going to the merits’ and a balance of hardships that tips
11 sharply towards the plaintiff can support issuance of a preliminary injunction, . . . [if] the
12 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
13 public interest.”). *Cottrell* presents some difficulty in light of *Winter* and *Stormans*. To the extent
14 *Cottrell*’s interpretation of *Winter* is inconsistent with *Stormans*, *Stormans* should control. See
15 *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*) (discussing the standards for
16 determining controlling authority).

17 The Supreme Court stated in *Winter* that “[a] plaintiff seeking a preliminary injunction
18 must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm
19 in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an
20 injunction is in the public interest.” *Winter*, 555 U.S. at 20. As a matter of grammar, the Supreme
21 Court has laid out four conjunctive tests, not a four-factor balancing test, using the word “likely”
22 to modify the success-on-the-merits test in exactly the same way as the irreparable-harm test. In
23 finding the “possibility” of irreparable harm to be insufficient, the *Winter* Court itself
24 emphasized (with italics) the fact that the word “*likely*” modifies the irreparable-harm prong. *Id.*
25 at 22. The word “*likely*” modifies the success-on-the-merits prong in a textually identical way.
26 *Id.* at 20. Therefore, to satisfy *Winter*, a movant must show that he is likely to succeed on the
27 merits and suffer irreparable harm.

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1 Regarding the irreparable-harm test, *Winter* is clear that the word “likely” means what it
2 normally means, i.e., more probable than not. There is tension in the case law, however, as to the
3 meaning of likely as applied to the success-on-the-merits test. Black’s Law Dictionary defines
4 the “likelihood-of-success-on-the-merits test” as “[t]he rule that a litigant who seeks [preliminary
5 relief] must show a reasonable probability of success” *Black’s Law Dictionary* 1069 (10th
6 ed. 2014). A Ninth Circuit case predating *Cottrell* that used the “serious questions on the merits
7 standard” as an alternative to a “probability of success on the merits” defined serious question as
8 a “fair chance of success on the merits.” *Republic of the Philippines v. Marcos*, 862 F.2d 1355,
9 1362 (9th Cir. 1985). The Ninth Circuit has reiterated the “fair chance” language since *Cottrell*.
10 *See, e.g., Arc of Cal. v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014).

11 **B. Adverse Inference**

12 Furthermore, this Court has “inherent discretionary power to make appropriate
13 evidentiary rulings in response to the destruction or spoliation of relevant evidence.” *Glover v.*
14 *BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). A finding of “bad faith” is not a prerequisite to an
15 adverse inference instruction. *Id.* To determine whether spoliation has occurred, the Court
16 applies a three-part test:

17 “(1) that the party having control over the evidence had an obligation to preserve
18 it at the time it was destroyed; (2) that the records were destroyed with a culpable
19 state of mind; and (3) that the evidence was relevant to the party’s claim or
defense such that a reasonable trier of fact could find that it would support that
claim or defense.”

20 *Fowler v. Wal-Mart Stores, Inc.*, Case No. 2:16-CV-450 JCM (GWF), 2017 WL 3174915, at *3
21 (D. Nev. July 26, 2017) (quoting *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989
22 (N.D. Cal. 2012)).

23 **III. DISCUSSION**

24 The Court, having duly considered Plaintiffs’ Motion for Preliminary Injunction, the
25 declarations and exhibits submitted therewith, Defendant’s Opposition to Plaintiffs’ Motion for
26 Preliminary Injunction, the declarations and exhibits submitted therewith, the pleadings and
27 records on file herein, and having received the oral argument of counsel presented to this Court,
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1 hereby makes the following preliminary findings and conclusions pursuant to Federal Rule of
2 Civil Procedure 65(d).

3 **A. FINDINGS OF FACT.**

4 1. Plaintiffs have preliminarily demonstrated that Exhibits A-1 through A-20 to the
5 Declaration of Changchun Shi in Support of Plaintiffs' Motion for Temporary Restraining
6 Order and Preliminary Injunction (ECF No. 15-1) contain trade secrets and
7 confidential/proprietary information ("Plaintiffs' Confidential Assets") as defined by the
8 Defend Trade Secrets Act ("DTSA") 18 U.S.C. § 1839(3) and Nevada's Uniform Trade Secrets
9 Act ("UTSA"), NRS § 600A.030(5).

10 2. Defendant signed the Zitan Confidentiality Agreement, Data Policy,
11 Communication Policy, and Termination Letter. (ECF Nos. 7-1, 7-2, 7-3 and 7-4).

12 3. Collectively, the Zitan Confidentiality Agreement, Data Policy, Communication
13 Policy, and Termination Letter specifically address the duties and obligations that Defendant
14 owed to Plaintiffs with regard to the protection and confidentiality of Plaintiffs' Confidential
15 Assets. Specifically, the Communication Policy prohibited Defendant from, among other things,
16 acquiring Plaintiffs' Confidential Assets from Plaintiffs' servers and moving same onto
17 Defendant's devices without Plaintiffs' explicit prior approval.

18 4. Plaintiffs have demonstrated that Defendant, while employed by Zitan,
19 downloaded 114 files from Zitan's cloud-based account, although it is disputed as to whether
20 the download was for business purposes. Nevertheless, the record indicates that files were
21 downloaded on March 23, 2018 were transferred to Defendant's personal computer. Plaintiffs
22 have also demonstrated that, on this same date, Defendant deleted at least 26 files from another
23 of Zitan's cloud-based accounts, although Defendant presented evidence that the files were
24 merely duplicative files already maintained in Zitan's servers.

25 5. Defendant has admitted that he immediately deleted the files downloaded to his
26 personal laptop computer.

27 6. Defendant also admitted that, following receipt of Plaintiffs' May 3, 2018 letter
28 instructing him to preserve all documents, electronically stored information, data and metadata,

1 he instead destroyed and discarded his personal laptop's hard drive. Defendant contends that he
2 did so to ensure that he no longer maintained possession of Plaintiffs' information.

3 8. There is no evidence in the record as to the current location of the destroyed hard
4 drive. The Court makes an adverse inference, as noted below, that Defendant may still possess
5 the documents downloaded to his personal laptop on March 23, 2018.

6 9. Defendant will suffer no harm by entry of an injunction.

7 **B. CONCLUSIONS OF LAW.**

8 1. Intellectual property assets such as Plaintiffs' Confidential Assets are worthy of
9 protection through injunctive relief.

10 Public disclosure of a trade secret destroys the information's status as a trade
11 secret. This harms the trade secret owner by both depriving him of a property
12 interest . . . and by allowing his competitors to reproduce his work without an
equivalent investment of time and money. Disclosure of non-trade secret
confidential information is similarly recognized as a serious harm.

13 *Saini v. Int'l Game Tech.*, 434 F.Supp.2d 913, 919 (D. Nev. 2006).

14 2. Both the DTSA and UTSA define "misappropriation" as "acquisition of a trade
15 secret of another by a person who knows or has reason to know that the trade secret was acquired
16 by improper means" or "disclosure or use of a trade secret of another without express or implied
17 consent" in specified circumstances. 18 U.S.C. § 1839(5)(A); NRS § 600A.030.

18 3. Zitan has preliminarily demonstrated that the Confidentiality Agreement, Data
19 Policy, Communication Policy, and Termination Letter, (ECF No. 7-1), are valid and existing
20 contracts. Plaintiffs have preliminarily demonstrated that Defendant likely breached the
21 Communication Policy. Plaintiffs have also demonstrated that they may suffer damage as a
22 result of said breaches. *Saini*, 434 F.Supp.2d at 919-20.

23 4. This Court may issue a preliminary injunction pursuant to Federal Rule of Civil
24 Procedure 65. In order to obtain a preliminary injunction, Plaintiffs are required to show: (a) a
25 likelihood of success on the merits; (b) a likelihood of irreparable harm in the absence of such
relief; (c) that the balance of equities tips in favor of Plaintiffs; and (d) the issuance of such an
order is in the public interest. *Winter*, 555 U.S. at 20; *Adidas America*, 800 F.3d at 753.

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1 5. Plaintiffs are likely to succeed on the merits of their claims under the DTSA (18
2 U.S.C. § 1836) and the UTSA ((NRS § 600A.010, *et seq.*), and breach of the Communications
3 Policy

4 6. There is no evidence in the record that Defendant actually possesses Plaintiffs'
5 Confidential Assets. However, this Court makes an adverse inference based on Defendant's
6 destruction of the hard drive to his personal computer after he was instructed to preserve all
7 potentially relevant electronically stored information, documents, data and metadata, including
8 his personal devices. *Glover*, 6 F.3d at 1319. Consistent with the test set forth in *Fowler*, this
9 Court concludes that: (a) Defendant had control over the hard drive to his personal computer, and
10 had an obligation to preserve it at the time he purportedly destroyed it; (b) Defendant destroyed
11 the hard drive with a "culpable state of mind" – that is, with knowledge that he was under an
12 expectation of preservation; and (3) the hard drive was (and is) relevant to Plaintiffs' claims
13 alleged in this action. Further, Defendant has not provided this Court with any evidence as to
14 where or how the hard drive was destroyed, or produced any evidence of its destruction. Thus,
15 the Court makes an adverse inference that Defendant's alleged destruction of his hard drive
16 supports a conclusion that Plaintiffs are likely to suffer irreparable harm absent entry of
17 preliminary injunctive relief as there is a risk to Plaintiffs that Defendant has the potential to
18 cause damage to the Plaintiffs should he possess any of Plaintiffs' trade secrets or confidential
19 information. *Leon*, 464 F.3d at 958; *Fowler*, 2017 WL 3174915, at *3.

20 7. Plaintiffs are likely to suffer irreparable injury to their business advantages if
21 Defendant uses and/or discloses to third parties Plaintiffs' Confidential Assets. Defendant's
22 possible continuing possession of Plaintiffs' Confidential Assets, given Defendant's destruction
23 of evidence, shows that Plaintiffs may suffer irreparable injury. Allowing Defendant to continue
24 in possible possession of Plaintiffs' Confidential Assets exposes Plaintiffs to possible irreparable
25 damage. *Prot. Techs., Inc. v. Ribler*, No. 3:17-cv-00144-LRH-WGC, 2017 WL 923912, at *2 (D.
26 Nev. Mar. 8, 2017); *United Capital Fin. Advisers, Inc. v. Capital Insight Partners, LLC*, No.
27 2:12-CV-0300-LRH-PAL, 2012 WL 1079329, at *3 (D. Nev. Mar. 30, 2012).

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1 8. The balance of the hardships tips in favor of Plaintiffs because issuance of this
2 preliminary injunction causes no harm to Defendant but merely prevents Defendant from
3 exploiting Plaintiffs' trade secrets and proprietary information and data for his own benefit, or
4 the benefit of third parties if Defendant were to actually possess the Confidential Assets.
5 Denying the requested preliminary injunction outweighs the harm to the legitimate interests of
6 Defendant from granting such relief. Granting this preliminary injunction simply places
7 Defendant "in the position [he] would have occupied if the breach of confidence had not
8 occurred [...]." *Winston Res. Corp. v. Minn. Mining & Mfg.*, 350 F.2d 134, 142 (9th Cir. 1965).

9 9. Entry of a preliminary injunction serves the public interest in protecting trade
10 secrets and proprietary information and data, as set forth in both the DTSA and the UTSA. *See*
11 *Prot. Techs., Inc.*, 2017 WL 923912, at *3.

12 10. This Court may enjoin any "actual or threatened misappropriation" and, in
13 appropriate circumstances, take "affirmative acts to protect a trade secret." 18 U.S.C. §
14 1836(a)(3); NRS § 600A.040.

15 11. A bond of \$100.00 is reasonable and adequate under the circumstances.

16 IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary Injunction (ECF No.
17 15) is GRANTED. Defendant Liang Yu, and any other persons or entities acting in active
18 concert or participation with, for, by, through, under, or in association with him are preliminary
19 enjoined from:

20 1. possessing, using, exploiting, disclosing or disseminating Plaintiffs' trade secrets
21 and proprietary information and data, including, without limitation, trading and
22 business strategies, real-time reporting, post-trade analysis, and technologies,
23 which are built on unique trading algorithms, mathematical models, predictive
24 signals, computer code, infrastructure design, and other related
25 proprietary/confidential information and data (collectively, "Plaintiffs'
26 Confidential Information").

27 2. utilizing Plaintiffs' Confidential Information for the benefit of Defendant and/or
28 any third party; and

1 3. engaging in any destruction, deletion, purging, scrubbing or other form of
2 spoliation of any and all data on or accessible through Defendant's electronic
3 devices and his third-party electronic accounts for storing information.

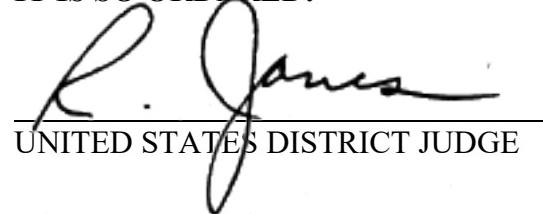
4 IT IS FURTHER ORDERED that Defendant shall:

- 5 1. Within five (5) days of the entry of this Order, make each one of his electronic
6 devices and his third-party electronic accounts for storing information available
7 for an independent forensic examination by Plaintiffs, subject to the terms and
8 conditions of the protective order and forensic search protocol entered in the
9 related arbitration; and
- 10 2. Within five (5) days of the entry of this Order, make each one of the mirrors or
11 replications of Defendant's electronic devices and his third-party electronic
12 accounts, presently in the possession of Setec Technologies, Inc., available for an
13 independent forensic examination by Plaintiffs, subject to the terms and
14 conditions of the protective order and forensic search protocol entered in the
15 related arbitration.

16 IT IS FURTHER ORDERED that the Stay Order (ECF No. 43) is hereby vacated in part
17 and only for the limited purposes of permitting Plaintiffs to effectuate the discovery set forth
18 above regarding examination of Defendant's electronic devices, third-party electronic accounts
19 for storing information, and the mirrors or replications of Defendant's electronic devices and his
20 third-party electronic accounts presently in the possession of Setec Technologies, Inc. In all
21 other respects, discovery shall be and remain stayed pursuant to the Stay Order.

22 IT IS FURTHER ORDERED that the Preliminary Injunction is effective upon Plaintiffs
23 posting a bond in the sum of One Hundred Dollars and No Cents (\$100.00).

24 **IT IS SO ORDERED:**

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26 _____
27 UNITED STATES DISTRICT JUDGE
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DATED: January 3, 2019